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Supreme Court, U.S.
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No. 04-

In the
Supreme Court of the United States

François Gouin, Jr.
Petitioner
v.
The Honorable Nancy M. Gould,
in her judicial and individual capacities,
The Honorable Sean Dunphy,
in his judicial and individual capacities,
The Honorable John J. Irwin, Jr.,
in his individual and former judicial (CJAM) capacities
The Honorable Barbara A. Dortch-Okara,
in her individual and judicial (CJAM) capacities
Trial Court of the Commonwealth of Massachusetts,
Commonwealth of Massachusetts,
Respondents

PETITION FOR A WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the judicially-created doctrine that declares judges absolutely immune from suit may bar claims against judges by a person exercising his First Amendment right to petition the Government for a redress of grievances.

2. Whether a judge's intentional and knowing contravention of existing mandatory, nondiscretionary, statutes violates the "good behavior" clause of the United States constitution and thereby makes the protection of judicial immunity unavailable.

3. Whether a judge's intentional and knowing contravention of existing mandatory, nondiscretionary, statutes constitutes "bad behavior," making the award of judicial immunity unavailable.

4. Whether a judicially-created amendment, the unratified, second prong of the Eleventh Amendment to the federal constitution, may bar money-damage claims against the Petitioner's State's judges under 42 U.S.C. §1983, the state and federal constitutions, and common law?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the First Circuit were petitioner François Gouin, Jr. and respondents The Honorable Nancy M. Gould, The Honorable Sean Dunphy, The Honorable John J. Irwin, Jr., The Honorable Barbara A. Dortch-Okara, Trial Court of the Commonwealth of Massachusetts, and the Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner François Gouin, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. In plain contravention of the requirements of the Constitution of the United States, federal law, the Constitution of the Commonwealth of Massachusetts, and state law, the state courts have embarked on an *ad hoc*, standardless, subjective, arbitrary, and lawless exercise of judicial power, which appears designed to thwart the will of the petitioner (and other members of the public similarly situated) as well as the considered judgments of Massachusetts legislative branch.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App. 1) is not reported. The memorandum opinion of the district court (App. 2-3) is also not reported.

An opinion of the Supreme Judicial Court of Massachusetts regarding Gouin's related petition for a writ of mandamus is reported in 435 Mass. 1003, 755 N.E.2d 1221 (2001). It arose out of the failure of Respondent Judge Gould's nonfeasance and malfeasance in the divorce action, two of the numerous unlawful acts that are the subject of the instant federal action.\[1]/

JURISDICTION

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[1] Gouin argued that neither he "'nor the child [*sic*, children] can be placed in status quo in the regular course of appeal,' and that unconscionable and irremediable damage will occur to him and to the child[ren] during the intervening period." 435 Mass. at 1004. The SJC failed to prevent a failure of justice where there was no alternative timely remedy. The SJC failed to prevent the harm and damage to the father and the couple's twin sons. In fact, the SJC's failure to act cemented the divorce court's decision not to act to stem the harm and damage.

The judgment of the United States Court of Appeals was issued on January 28, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Article 3, §1.

Section 1 of art, 3 reads in pertinent part, "The Judges, both of the supreme and inferior Courts, shall hold their Offices **during good Behaviour**, . . ." *Id.* (emphasis supplied).

U.S. Const., Article 6, cl. 2.

Clause 2 of Article VI reads in pertinent part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const., First Amendment.

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press ; or the right of the people . . . to petition the Government for a redress of grievances."

U.S. Const., Fifth Amendment.

The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., Eleventh Amendment.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one

of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const., Fourteenth Amendment, Section 1.

Section 1 of the Fourteenth Amendment reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mass. Const., Preamble

The Preamble defines the Commonwealth as a "Body politic ... formed by a voluntary association of individuals,..."

Mass. Const. Part the First, Declaration of Rights, art. V.

Article V reads: "All power residing originally in the people, and being derived from them, the magistrates and officers of government, visited with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times **accountable** to them." *Id.* [emphasis supplied].

Mass. Const., Part the First, Declaration of Rights, art. VIII.

Article VIII reads: "In order **to prevent those, who are vested with authority, from becoming oppressors**, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments." *Id.* [emphasis supplied].

Mass. Const., Part the First, Declaration of Rights, art. XI.

Article XI reads in pertinent part, "Every subject of the Commonwealth ought to find a certain remedy, by having re-

course to the laws, for all injuries or wrongs which he may receive in his person, property, or character. . . . conformably to the laws."

Mass. Const., Part the First, Declaration of Rights, art. XII.

Article XII reads in pertinent part, "No subject shall be held to answer for any Crimes of offence, until the same is fully and plainly, substantially and formally, described to him."

Mass. Const., Part the First, Declaration of Rights, art. XX.

Article XX reads, "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."

Mass. Const., Part the First, Declaration of Rights, art. XXIX.

Article XXIX reads, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their **offices as long as they behave themselves well**; and that they should have honorable salaries ascertained and established by standing laws." *Id.* [emphasis supplied].

Mass. Const., Part the Second, article XCVIII, amending and annulling article 1of Chapter III of Part the Second of the Constitution.

Article XCVIII reads in pertinent part, "The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during **good behavior**, excepting such concerning whom there is different provision made in this Constitution; provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; . . ." *Id.* [emphasis supplied].

Massachusetts General Law c. 4 § 7 Definitions of statutory terms; statutory construction.

Section 7 of M.G.L. c. 3 reads in pertinent part, "'Person' ...shall include corporations,..., associations and partnerships."

Massachusetts General Law, Chapter 208: Section 30 Minor children; removal from commonwealth; prohibition.

Section 30 of chapter 208 reads, "A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security and issue writs and processes to effect the purposes of this and the two preceding sections."

Massachusetts General Law, Chapter 209B: Section 5(a) Notice and opportunity to be heard; proper parties (Massachusetts Child Custody Jurisdiction Act).

Section 5(a) of chapter 209B reads in pertinent part, "Reasonable notice in conformity with section six and an opportunity to be heard shall be given to the contestants, . . ."

Massachusetts General Law, Chapter 215: Section 56A

Section 56A of chapter 215 reads, "Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations except those for the investigation of which provision is made by section sixteen of chapter two hundred and eight. Said guardian ad litem shall, before final judgment or decree in such proceeding, report in writing to the court the results of the investigation, and such report shall be open to inspection to all the parties in such proceeding or their attorneys. The compensation shall be fixed by the court and shall be paid by the commonwealth, together with any expense approved by the court, upon certificate by the judge to the state treasurer. The state police, local police and probation officers shall assist the guardian ad litem so appointed, upon his request."

STATEMENT OF THE CASE

I. The Underlying Litigation: Proceedings in the Massachusetts Probate & Family Court Department

Petitioner is a father who was victimized by all the respondent judges intentionally violating the command in §56A of M.G.L. c. 215 that the Commonwealth shall bear the cost of the fees of the guardians ad litem appointed under that section.\2,3/ After the burdens shifted, Petitioner's

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[2] Petitioner challenges the constitutionality of 215:56A on the grounds that it allows justices to abrogate their judicial responsibilities by delegating them to untrained persons who are required to have no relevant credentials or knowledge and who work to no standards [A29-39 and par. 44]. Making matters worse, the Trial Court, in a Memo dated 28 February 1997, instructed sitting justices to violate 215:56A by shifting the burden of paying the fees of the GALs from the Commonwealth to the parties. The judge on the Gouin case neither followed the Trial Court's memorialized instruction to assess the parties' ability to pay nor complied with 215:56A before ordering the parties to share the cost of the GAL's fees.

money was converted by court-appointed fiduciaries to pay those unlawfully imposed fees.

Petitioner is a father who was victimized by Respondent Judge Gould's intentional violation of M.G.L. c. 208, §30, the child-removal statute, which does not allow the removal of the children without the opposing parent's consent or a showing of just cause. Petitioner opposed the removal and never gave his consent.

Petitioner is a father who was victimized by a judge's intentional violation of M.G.L. c. 209B, §5(a), the Massachusetts Child Custody Jurisdiction Act, which does not allow the removal of children to another State without a hearing at which the nonconsenting parent would have the opportunity to cross-examine the GAL who recommended the removal – in this case *ultra vires* -- and to rebut any materials adverse to him which she might have had. The evidentiary hearing was not held before the court allowed the children's removal out of state. After the children were removed, the court held a sham evidentiary hearing, a sham because the petitioner was not allowed by the court to attend.\[4]/

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[3] The two GALs' fees were $25,000± and were paid with monies unlawfully converted by successive quasi-judicially-immunized court-appointed trustees from an escrow account funded with Gouin's money.

[4] The scheme was explained in note 43 of petitioner's appellate brief. The figure above is an excerpt from the wife's legal bill from the firm of her counsel, who shortly thereafter was appointed to a judgeship in the Probate & Family Court Department. Jack Scully is a First Assistant Register in the Boston Division of that court. He was tending to this case before Respondent Judge Gould. Petitioner contends that Asst. Register Scully would not have passed to counsel the message that the parties would not be allowed to attend the evidentiary hearing unless Judge Gould had told him to do so. This documentary evidence of a piece of the scheme was discovered and entered into evidence in the divorce trial after the Complaint in the instant case was filed.

08/14/08	MERRILL	SCULLY - TELEPHONE FROM JACK SCULLY RE: JUDGE STILL WANTS HEARING; TELEPHONE FROM BARBARA BEARDSLEE; CONFERENCE WITH KEVIN; SET UP HEARING TIME; TELEPHONE TO COURT WITH KEVIN RE: CLIENTS AT HEARING; MESSAGE FROM SCULLY -- NO CLIENTS, GAL AND COUNSEL ONLY	[redacted] 0.00

In sum, this case is about the harm and long-term damage that has been inflicted upon Gouin and his children by the courts while the parents have been divorcing.\[5]/ Here, the respondent judges – as well as their successor judges -- have escaped liability and accountability even while the children are being harmed and Gouin has been deprived of the ability and parental right and obligation to protect them. Here, like hundreds of thousands of other fathers and their children across this nation, Gouin and his twin sons have suffered unconscionable and irremediable damage during the intervening period – as in Gouin's case, often years -- between the initiation of divorce and the dissolution of the marriage. That fathers and their children "can be placed in *status quo* in the regular course of appeal" – as the Supreme Judicial Court of Massachusetts has written -- is myth. 435 Mass. at 1004.

II. Proceedings in the U.S. District Court in Boston and the First Circuit Court of Appeals

The United States District Court at Boston held, and the First Circuit affirmed, that "[t]he judgment of the district court is affirmed essentially for the reasons stated in its Order of January 22, 2002," to wit,

(a) that the Eleventh Amendment bars the determination of whether a state statute is unconstitutional,

(b) that state judges are not subject to suit under federal civil rights statutes because they are not "persons" and that the money damage claims against them in

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5 That which was in the court's opinion best for the children was not; it did serious damage to the children's well-being.

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their individual capacities are barred by judicial immunity,

(c) that claims under 42 U.S.C. §1983 cannot be based on a violation of state law,

(d) that the alleged class-based animus was not adequately alleged for claims under 42 U.S.C. §1985(3), 42 U.S.C. §1986), and 18 U.S.C. §1511 (RICO), and

(e) that claims based on alleged violations of state law are barred by the Eleventh Amendment.

The district court made no distinction between judicial and non-judicial acts. It made no distinction between general and limited jurisdiction. It made no distinction between the nature, function, and acts of the diverse respondents. It simply used the words "judicial immunity" and "Eleventh Amendment" as magic wands.

The First Circuit added no independent opinion. Without a hearing, it rendered a summary affirmation.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because the Courts Below Disregarded the Constitutional Demand for Judicial Good Behavior

The question in this case is whether two judicially-created doctrines – the doctrine of judicial immunity and the doctrine of the "second prong of the Eleventh Amendment" -- can be used to strip Petitioner of his First Amendment right to petition, and to seek redress for his grievances.

These doctrines nullify the plans of the Framers of both the Massachusetts and United States constitutions to assure that judges behave well, that the public may petition and seek redress, that the laws will not be suspended except as provided in the constitutions, that all magistrates and officers of all three branches of government shall be accountable to the people at all times. U.S. Const. First, Fifth, and Fourteenth

Amendments. Mass. Const., Decl. of Rts., arts. V, VIII, XX, XXIX, XCVIII.

By applying the two doctrines across the nation on almost every case the public brings against its government or the officers thereof rendered meaningless the Framers' plain and express intent to restrict bad behavior.\[6]/

Even assuming *arguendo* that the doctrine of judicial immunity may legitimately protect judges, "absolute judicial immunity does not apply to non-judicial acts, i.e., the administrative, legislative, and executive functions that judges may on occasion be assigned to perform." *Duvall v. County of Kitsap*, 260 F.3d 1124, 2001.C09.0000732 <http://www.versuslaw.com> ¶¶29 (9th Cir. 2001), citing *Forrester v. White*, 484 U.S. 219, 227 (1988). *See also Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam) ("a judge is not immune from liability for non-judicial acts, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction") (citations omitted).

Where Respondent Judge Irwin issued a memorandum statewide to all judges and court personnel to shift the burden of the payment of GALs' fees from the Commonwealth to the parties, his act was administrative, non-judicial act. Immunity was inapplicable.

His successor, Respondent Judge Dortch-Okara, continued the practice and the policy. Immunity was inapplicable.

Respondent Judge Dunphy is the CJAM, Chief Justice of Administration and Management of the Probate & Family

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[6] The notion that a violation of the plain language of the Constitution can gain legal stature by long-continued practice is not one I can subscribe to. A majority group, as de Tocqueville observed, too often "claims the right not only of making the laws, but of breaking the laws it has made." De Tocqueville, *Democracy in America,* Vol. 1, at 261.

Cohen v. Hurley, 366 U.S. 117, 142 n.23 (1961) (Mr. Justice Black, with whom Chief Justice Warren and Justice Douglas concurred, dissenting).

Court Department. He failed to act to assure that the judges under his management complied with the statutes. He also failed to oversee the judges in his department – one of his explicit duties set out by statute -- and send them for training if necessary. Immunity was inapplicable.

Respondent Judge Gould acted both non-judicially and judicially with "bad behavior." Petitioner contends that the non-judicial act was the judge's shifting the burden of paying the guardian *ad litem* fees from the Commonwealth onto the parties. As the 6th Circuit Court of Appeals held, "a judge may be liable for action that is administrative in nature and that does not alter the rights and liabilities of the parties." *Johnson v. Turner*, 1997.C06.281, <http://www.versuslaw-.com> ¶55, No. 94-5919 (6th Cir. 1997). citing *Morrison v. Lipscomb*, 877 F.2d 463, 464-66 (6th Cir. 1989). Although burdened by that payment, the rights and liabilities of the petitioner and his estranged wife vis-à-vis each other in the divorce case were not affected. To be determined in divorce are such issues as child custody, alimony, and property distribution. Whether the Commonwealth or the parties paid the fees was not going to affect the court's decision on child custody or alimony or property distribution. So Judge Gould, like the other judges, should not have been given judicial immunity for her violation of M.G.L. c, 215 §56A. It was a non-judicial act.

Judge Gould's acts that constituted "bad behavior" are her intentional contravention of M.G.L. c. 208, §30, by allowing the removal of the couple's children to Maine without Gouin's consent, and her intentional contravention of M.G.L. c. 209B, §5(a), by not allowing an evidentiary hearing prior to her making a decision and then – when she decided to allow a hearing *after* the Order had already issued – by not allowing the parties to attend the hearing.

If any court in any capacity knowingly and intentionally acts in such a way that deprives parties of their rights and liabilities without due process, there must be accountability

and liability. The keywords are, of course, knowingly and intentionally. Otherwise it would be as held by the court in *Figueroa v. Blackburn,* 208 F.3d 435, 2000.C03.0042063 at ¶56, <http://www.versuslaw.com> (3d Cir. 2000): "preposterous." Petitioner is not implying that judges should be liable for mistakes. A mistake is one thing, an intentional act that the actor knows deprives a party of constitutional rights is another. It is that distinction that appears to be an issue of first impression.

The court in *Figueroa* did note that Judge Blackburn "fail[ed] to follow the requirements of [the New Jersey statute and thereby] hampered Figueroa's ability to seek the immediate appellate review intended by the rule,"[7] but then did not need to reach that fact in its determination of the question then before the court, to wit, whether judges of courts of limited jurisdiction, such as the New Jersey municipal courts, are afforded absolute immunity for their judicial acts.[8]

The court in *Figueroa* also concluded that "Judge Blackburn's actions ignored the New Jersey Supreme Court's protocol for exercising summary contempt powers,"[9] and cited another New Jersey case for the proposition that "[w]ith few exceptions [including summary contempt proceedings], every

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[7] *Figueroa*, 2000.C03.0042063 at ¶55 n. 9 and n. 9 at ¶69.

[8] The additional noteworthiness of *Figueroa* is found in the irrational typicality of that court's conclusion that a judge does not need to determine whether he or she has jurisdiction prior to exercising jurisdiction. *Figueroa* at ¶55 ("To find otherwise would require a judge to refrain from exercising jurisdiction prior to determining whether jurisdiction, in fact, exists"). Petitioner contends that that lack of logic – analogous to concluding that a breach of contract occurred before proving that there was a contract, or concluding that negligence occurred before proving that the alleged tortfeasor had a duty to the complainant – infects the judicial immunity cases. Any excuse in a storm, to avoid having to define and distinguish between "good behavior" and "bad behavior."

[9] *Figueroa*, 2000.C03.0042063 at ¶19 n. 3 and n. 3 at ¶63.

contempt calls for an explanation" [*id.*],\[10]/. but again did not reach the significance of the distinction between a judge's mistake and a judge's knowing and intentional act that deprives a party of his or her constitutional rights. It is that distinction, as noted, that appears to be an issue of first impression.

Of course, it is well-settled that where the respondent judges were acting in a non-judicial capacity; the judges are not immune from suit seeking monetary damage. *Mireles*, 502 U.S. at 11-12. Not withstanding that well-settled law, the district court wrongly dismissed the claims against judges who acted non-judicially (Respondents Irwin, Dortch-Okara, and Dunphy) and that decision was affirmed by the First Circuit Court of Appeals.

II. Review Is Warranted Because Accountability and Liability Are Being Evaded

A. By Granting Judicial Immunity Despite Conflict with Constitutional "Good Behavior"

This case is about **(a)** the limit of judicial power under both the United States and Massachusetts constitutions, which explicitly state that judges can hold office "during good behavior," **(b)** the failure of the federal and state judiciary to define what constitutes "good behavior," **(c)** the resulting evasion of accountability and **(d)** the subsequent unlawful defeat of meritorious petitions by the public, all against the public good by defeating the First Amendment right to petition.\[11]/

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10 "Thus, even proceedings [the defendant] should be informed of the charge and given an opportunity either to dispel any possible misunderstanding or to present any exculpatory facts that are not known to the court." Id. at 62. At the time of Figueroa's arrest, Judge Blackburn neither provided him with a reason for his arrest nor permitted him the opportunity to explain his actions. See supra note 2" [*Figueroa*, 2000.C03.0042063 at ¶63].

11 U.S. Const., Article 3, §1. Mass. Const., Part II, c. 3, art. 1, as amended by art. 98 of the Amendments to the Constitution. Mass. Const., Part the First, art. XXIX, Declaration of Rights. *Opinion of the*

While many cases do, indeed, acknowledge the constitutional mandate that "good behavior" is the bright blue line between a "good" judge and a "bad" judge,\[12]/ the standard for determining what constitutes "good behavior" is rarely discussed in either federal or state opinions.\[13]/ Even in *Mcallister v. United States*, 141 U.S. 174, 180, 187, 196 (1891), which traced the early history of "good behavior" in this context [*id.*, at 194-197], the Court failed to address the types of behavior that would be deemed "not good." There are, of course, a few exceptions, such as *Chandler v. Judicial Council Tenth Circuit*, 398 U.S. 74, 77 (1970), which disclosed in the dissent that

> "[w]illful misconduct in office or willful and persistent failure to perform his official duties by a judge of the United States shall constitute conduct inconsistent with the good behavior required by article III of the Constitution and shall be cause for the removal of that judge."

Chandler, 398 U.S. at 140 n. 8 (Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissenting).\[14]/ *Chandler*

Justices, 360 Mass. 907, 908 (1971) ("By virtue of our Constitution, judges in Massachusetts hold their offices 'during good behavior'"); *Opinions of the Justices to the Senate*, 372 Mass. 883, 899-900 (1977); *Opinion of Justices*, 271 Mass. 575, 580 (1930).

[12] Petitioner does not make claim against any of the judges for "abuse of discretion." Gouin complains only about judges intentionally failing to follow mandatory, nondiscretionary, statutes, and thus depriving him of due process, to wit, notice and an evidentiary hearing. No legislature contemplated judges would intentionally not follow mandatory statutes. The harm has been irreparable.

[13] Section 176 of 28 U.S.C. reads in pertinent part, "Removal of a judge of the United States Court of Federal Claims during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability." There is no cognate in Massachusetts. Gouin, the petitioner here, was not in the case below seeking removal but money damages.

[14] *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984) (holding that the United States Constitution does not immunize a sitting federal judge

was, however, a case that presented an internal problem of the division of work and addressed whether the extraordinary writ of mandamus was necessary or appropriate. And although the majority concluded that the petitioning judge was "presently unable, or unwilling to discharge efficiently the duties of his office," the judge's inability or unwillingness was related to the number of cases that had been assigned to him, and not related to his contravening one or more mandatory statutes – as was the case in the Gouin divorce action in state court.

Petitioner's argument has been that judges' admitted, intentional failure to follow mandatory, nondiscretionary, statutes is not good behavior.\[15]/, \[16]/ Those acts of intentionally failing to comply, as legislatures contemplated, with duly ratified statutes not only deprived petitioner of due process, to wit, notice and an evidentiary hearing, those intentional wrongful acts, Petitioner argues, deprive the judges of the protection of absolute judicial immunity.

The harm has been irreparable to petitioner. It should also be to the judges. Accountability and redress, which the Framers of the Massachusetts Declaration of Rights contemplated in articles V and XI, are required. There appear to be no cases, either state or federal, which attempt to address the conduct of judges who intentionally circumvent existing stat-

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from criminal prosecution for income-tax evasion prior to his removal from office by the impeachment process) and cases gathered.

[15] By so doing, the judges also unlawfully suspended the Laws, in contravention of article XX of the Mass. Declaration of Rights.

[16] In their brief below, the respondent judges claimed they circumvented the statute (G.L. c. 215, §56A) because of the Commonwealth's economic need. And in the state court, petitioner introduced documentary evidence of Respondent Madame Justice Gould **(a)** scheduling a mandatory evidentiary hearing for the removal of the children out-of-state 2-1/2 weeks *after* she issued the order allowing the removal which would have arisen from the hearing and **(b)** forbidding the parties to the divorce to attend it. It was the petitioner who was irreparably harmed and suffered increasing damage.

utes. *Figueroa*, discussed *infra*, is but one of many that perambulate logorrheically around and through the issue.

The failure of the state judges to "behave themselves well" during office and the failure of the federal judiciary to acknowledge the complained-of behavior as "bad behavior" is encouraged by the unwavering adherence to the repugnant doctrine of judicial immunity.

That doctrine arose out of the most reviled court in British history, the Star Chamber, and allows judges to remain in office and/or to escape being accountable to the public even when they are acting either maliciously or corruptly. *Floyd and Barker*, 12 Co.Rep. 23, 25, 77 Eng.Rep. 1305, 1307 (1607) (case of conspiracy). *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). *Stump v Sparkman*, 435 U.S. 349, 355-356 (1978).

> In Bradley, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: . . . if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, at 357 n. 7, citing *Bradley*, at 352. The key word "knowingly" is missing from both *Bradley* and *Stump*. From the omission, one can infer that the judge knew what he was doing, i.e., that the judge knew there was no crime committed, and that, therefore, the word "knowingly" was implied. To convict knowingly an innocent man of a non-existent crime is unconscionable, if not unconstitutional, and should be thought so by this august Court.\[17]/ Given the rationale of the roots of the doctrine, the doctrine of judicial immunity must be abandoned.

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[17] It is also contrary to art. XII of the Massachusetts Declaration of Rights, which provides the right not to have to answer for so-called crimes which cannot be described. To have to stand trial for an imagined crime results in losing that right, too, "forever."

The untenable excuse is that were judges to be reined in and made liable, their independence would be jeopardized. This excuse defies common sense. It allows judges not only to remain unaccountable but also to continue to be malicious and corrupt. This is unacceptable to the large majority of the American public, who justifiably believes the courts are broken.

It is more likely than not that the Framers of both constitutions – that of the Commonwealth of Massachusetts and that of the United States – did not believe malicious or corrupt acts to be synonymous with "good behavior."

> The American Colonists were not willing, nor should we be, to take the risk that '(m)en who injure and oppress the people under their administration (and) provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.' The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect 'the obsolete doctrine that the governed must not criticize their governors.'

New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (citations omitted).

B. <u>By Declaring the Commonwealth and Judges Not "Persons"</u>

To allow the Commonwealth and the judges to avoid liability and accountability, the federal courts declared that the Commonwealth and the judges are not "'persons' subject to suit under *those* federal civil rights statutes." (App. 3, emphasis supplied.)

Yet, notwithstanding those decisions of the lower federal courts in the petitioner's case, it is inescapable that the

Commonwealth and judges are "persons," for **(a)** the Preamble of the Massachusetts Constitution defines the Commonwealth as a "Body politic . . . formed by a voluntary association of individuals" and **(b)** in M.G.L. c. 4, §7, the legislature declared that an "association" is amongst the entities that is a "person" for all purposes.

A similar result has been conceded in this Court: "[T]he expressed intent of Congress, manifested virtually simultaneously with the enactment of the Civil Rights Act of 1871, was that the States themselves, as bodies corporate and politic, should be embraced by the term "person" in sec. 1 of that Act." *Quern v. Jordan*, 440 U.S. 332, 355-357 (1979).

Similarly, according to Mr. Justice William Douglas, who traced the legislative history of §1983 (in Cong. Globe, 42d Cong., 1st Sess.), congressional intent was to hold judges, as well as every other person, liable for the deprivation of a citizen's civil rights. [App. brief. p. 47]. "There was no exception for members of the judiciary." *Pierson v. Ray*, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting).

C. By Applying the Eleventh Amendment, a Two-Headed Hydra, to Otherwise Meritorious Claims

Another untenable excuse used by the federal courts to allow the judicial respondents to escape liability and accountability is the Eleventh Amendment. Like the doctrine of judicial immunity, the nascence of the *second* prong of the Eleventh Amendment was without the potency of any Congress. It was birthed almost 100 years after the duly-ratified first prong of the Eleventh Amendment, which has no application here whatsoever, by a court acting outside the scope of its authority. *Hans v. Louisiana,* 134 U.S. 1 (1890) (enhanced the Eleventh Amendment by judicial fiat by holding that a citizen cannot sue his/her own State in federal court). It was a court that when circumventing the legislature by usurping its law-making power, transformed our government into one that oppressed the governed.

This was contrary to what our Framers intended.\[18]/ To prevent such oppression, the Framers gave the public the right to return those oppressing the governed to private life. U.S. Const., Art. 3, §1. Mass. Declaration of Rights., art. VIII. It is reasonable to conclude that the Framers considered that the public would choose from the full spectrum of sanctions: from the giving of relief for one identifiable wrongdoing to the harsh sanction of impeachment. Thus the district court here holding and the First Circuit for affirming that the Eleventh Amendment barred Gouin's §1983 claims in Counts 1 and 8 through 14 was reversible error.

Moreover, where Article V of the Massachusetts Declaration of Rights explicitly guarantees accountability by all magistrates and officers of each branch of government to all the people at all times, and where it does not distinguish between the Commonwealth of Massachusetts or the individuals in their individual or official capacities, article V constitutes the state's express and unequivocal consent to suit by the people (App. Brief, pp. 14 ff.). Thus the Eleventh Amendment may neither override the Commonwealth's constitutional guarantee of accountability nor bestow sovereign immunity on the Commonwealth where there was no immunity *ab initio* (*id*). Certainly the Eleventh Amendment cannot preempt article V of the Declaration. Notwithstanding the obvious issue of competing constitutions, Article VI of the federal constitution would have to be invoked, and that is impossible. To invoke the Article VI, the intent of the United States Congress to preempt the Massa-

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[18] Not having been duly ratified, the second prong of the Eleventh Amendment may not be invoked against the petitioner. Nor may it override or preempt article V of the Mass. Declaration of Rights, which has since 1780 constitutionally guaranteed accountability at all times by all three branches of government to the people, of which he is one. Nor may it supercede the Fourteenth Amendment, duly ratified 22 years prior to the grenade thrown at the civil rights of individuals in *Hans*. Nor may it override the plain language of §1983, enacted to enforce the provisions of the Fourteenth Amendment. Nor may it overrule the intent of Congress not to afford immunity to those judges who deprive citizens of their civil rights. (App. Brief, at 8).

chusetts Declaration of Rights would have to be shown, and where no United States Congress took part in the birth or the development of the Eleventh Amendment, no such intent can be shown.

III. Review is Warranted Because the Conflict Between the Judicially-Created Law and the Constitution Must Be Resolved.

First Amendment and other constitutional interests should trump the respondents' interests in immunity.

By not having an existing statute or a constitutional provision upon which judicial immunity or the second prong of the Eleventh Amendment are based, and no ordinary constitutional analysis -- using strict or intermediate scrutiny or a rational basis test -- of the facts of the case or of Petitioner's legal arguments, the decisions below leave unsettled the critical conflict between the judicially-created law and the constitutions. This Court, therefore, should grant review in this case to resolve this conflict.

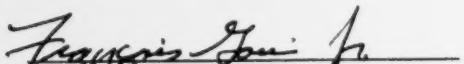
If this Court re-cements the rule that judges are absolutely immune from challenges except when there are criminal circumstances and a total absence of jurisdiction, the decision would not only short-circuit this and any other petitioner's First Amendment rights, even in the face of "judicial bad behavior," it would also short-circuit the "good behavior" clauses in both the state and federal constitutions.

Where judicial immunity and the second prong of the Eleventh Amendment have never been scrutinized and cannot be attributed to the Framers or to any Congress, the application of the judicially-created doctrine of judicial immunity and the unratified second prong of the Eleventh Amendment, must not be continued as *de facto* constitutionalized policies or practices.

CONCLUSION

For the foregoing reasons, petitioner submits that this Court should grant review in this case to reverse the holding of the First Circuit with respect to judicial immunity and the Eleventh Amendment.

Respectfully submitted,



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22 April 2004

United States Court Appeals
For the First Circuit

No. 02-1144

FRANCOIS GOUIN, JR.,

Plaintiff, Appellant,

v.

HONORABLE NANCY GOULD, ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Lipez and Howard, Circuit Judges

JUDGMENT

Entered: January 28, 2004

The judgment of the district court is affirmed essentially for the reasons stated in its Order of January 22, 2002. See 1st Cir. R. 27(c).

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[cc: Ms. Johnson and Mr. Weitzel.]

Certified and Issued as Mandate under Fed.R.App. 41.
Richard Cushing Donovan, Clerk.
Date: 2/18/04

App. 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-CV-11702-GAO

FRANCOIS GOUIN, JR.,
Plaintiff
v.
THE HONORABLE NANCY M, GOULD; THE HONORABLE SEAN DUNPHY; THE HONORABLE JOHN J.IRWIN, JR.; THE HONORABLE BARBARA A. DORTCH-OKARA; the TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS; and the COMMONWEALTH OF MASSACHUSETTS,
Defendants

MEMORANDUM AND ORDER
January 22, 2002

O'TOOLE, D.J.

The plaintiff, Francois Gouin, has filed a complaint alleging fourteen claims based on various state and federal laws. The defendants' motion to dismiss is granted for the following reasons, as well as for the reasons set for in the defendants' memorandum.

Count One is dismissed because claims against the Commonwealth are barred by the Eleventh Amendment. See Pennhurst State Sch. & Hosp. Halderman, 465 U.S. 89. 99 (1984) (holding that the state's consent to being sued must be express and unequivocal); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 938 (1st Cir. 1993). Moreover, the claim that the state statute at issue is unconstitutional on its face is plainly deficient. A statute may be found to be facially invalid only if it appears that there is no circumstance in which it could be constitutionally applied. See United States v. Salerno, 481 U.S. 739, 745 (1987) (the plaintiff "must establish that no set of circum-

stances exists under which the [statute] would be valid"). The plaintiff's own factual allegations indicate that it is the way in which the statute was applied in his case that he finds grievous.

Counts Two, Three, Four, Five, and Six are dismissed as to the Commonwealth, the Trial Court Department, and the individual judicial defendants in their official capacities because they are not "persons" subject to suit under those federal civil rights statutes. See Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Coffin v. South Carolina Dep't of Soc. Servs., 562 F.Supp. 579 (D.S.C. 1983). All of the claims for damages against the judges in their individual capacities are barred by the doctrine of judicial immunity. See Stump v. Sparkman, 435 U.S. 349,355-56 (1978).

Counts four and five are also subject to dismissal under Fed.R.Civ.P. 12(b)(6) because a claim under 42 U.S.C. §1983 cannot be based on a violation of state law. Counts Three, Six, and Seven are also subject to dismissal under Fed.R.Civ.P. 12(b)(6) because they do not adequately allege the class-based animus required for a 42 U.S.C. §1985(3) claim, the conspiracy required for a 42 U.S.C. §1986 claim, and the elements required for a civil RICO claim under 18 U.S.C. §1511, respectively.

Finally, Counts Eight, Nine, Ten, Eleven, Twelve, Thirteen and Fourteen are based on alleged violations of state law and are barred by the Eleventh Amendment. See Pennhurst 465 U.S. at 106.

For the foregoing reasons, the defendants' motion to dismiss is GRANTED. The case is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

January 22, 2002
Date

/s/ George A. O'Toole
DISTRICT JUDGE